

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Case No. 13-1561

JOHN GREGORY LAMBROS,)	
)	
Petitioner-Defendant,)	UNITED STATES RESPONSE TO
)	DEFENDANT’S APPLICATION TO
v.)	FILE SUCCESSIVE SECTION 2255
)	HABEAS PETITION
UNITED STATES OF AMERICA,)	
)	
Respondent-Plaintiff.)	

United States of America, appearing through its attorneys, B. Todd Jones, United States Attorney for the District of Minnesota, and Ann M. Anaya, Assistant United States Attorney, hereby submits this response in opposition to Petitioner’s Application to File a Successive Section 2255 Habeas Motion.

PROCEDURAL HISTORY

Petitioner was recently before this Court with an application to file a successive Section 2255 petition in Lambros v. United States, Eighth Circuit Case No. 12-2427. Petitioner’s post-conviction procedural history was set forth in detail in the Government’s Response to Petitioner’s Application filed on July 23, 2012, and will not be repeated here.

In that case, Petitioner requested authorization from this Court to file a successive Section 2255 petition based on the Supreme Court decisions in Lafler v. Cooper, 132 S. Ct. 1376 (2012) and Missouri v. Frye, 132 S. Ct. 1399 (2012). Petitioner challenged his 1989 conviction and thirty year sentence (where he was found guilty by a jury on all four counts) for distribution and conspiracy to distribute more than nine kilograms of cocaine. United States v. Lambros, Criminal No. 4:89-cr-82(05) (RGR) (D. Minn.). This Court denied Petitioner’s successive habeas application on October 24, 2012. Id., Judgment.

A subsequent application was filed by Petitioner on March 13, 2013, once again, seeking retroactive application of the Supreme Court decisions in Cooper and Frye. However, this time, Petitioner attacks his 1975 and 1976 convictions for possession to distribute two pounds of cocaine and assault of a federal officer with a dangerous weapon.¹ Petitioner's Application, Exhibits A-G. Petitioner asserts that Cooper and Frye created a new rule of constitutional law, namely the Sixth Amendment right to effective assistance of counsel during plea-bargaining, that applies retroactively. Petitioner's Application at 2–12. Petitioner claims this right was violated because his attorney failed to adequately investigate the circumstances surrounding his plea and did not possess an understanding of the statutory law and available defenses. Id. at 15–18.

ARGUMENT

In order to obtain authorization to file a successive § 2255 motion, a prisoner must assert claims based on either: (1) a new rule of constitutional law, previously unavailable, made retroactive by the Supreme Court to cases on collateral review; or (2) newly discovered evidence, not previously discoverable by due diligence, that would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the movant guilty of the offense. 28 U.S.C. §§ 2244(b)(2), 2255. The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies one of those requirements. Id. Petitioner's claims involve only on subsection (1) and do not include subsection (2).

¹On June 21, 1976, Petitioner was sentenced to five years imprisonment on the possession count and 10 years imprisonment on the assault count, with the sentences to run concurrently. Petitioner's Application, Exhibits C, D. The Parole Commission has a detainer warrant pending on Petitioner for a revocation hearing regarding his parole on the 1976 sentences, which will be executed up the completion of his 30 year sentence in the 1989 criminal case. Id., Exhibit E.

Petitioner's claims are based on what he asserts is a new rule of constitutional law guaranteeing effective assistance of counsel during plea bargaining, created by Cooper and Frye, that applies retroactively. Case No. 13-1561, Lambros' Application at 1. To succeed on either claim, Petitioner must show two things: (1) that Cooper and Frye created a new constitutional rule, and (2) that the rule they created applies retroactively. Petitioner's successive habeas application fails to meet the first requirement and should be denied.

Petitioner's request for relief has been foreclosed by this Circuit's recent decision in Williams v. United States, 705 F.3d 293 (8th Cir. 2013), which held that "neither Cooper nor Frye announced a new rule of constitutional law." Id. at 294. Williams, like Petitioner in our case here, was seeking authorization to file a second section 2255 motion based on a new rule of constitutional law created by Cooper and Frye. Id. The Court noted the analysis in Cooper and Frye was consistent with the approach many district courts had been taking for years. Id. The court also noted that interpretation is consistent with the conclusion reached by the other circuit courts of appeals that have addressed the issue. Id.; See Buenrostro v. United States, 697 F.3d 1137, 1140 (9th Cir.2012); In re King, 697 F.3d 1189 (5th Cir.2012) (per curiam); Hare v. United States, 688 F.3d 878, 879–80 (7th Cir.2012); In re Perez, 682 F.3d 930, 932–34 (11th Cir.2012) (per curiam).

Petitioner does not assert prima facie claims based on a new rule of constitutional law, previously unavailable, made retroactive by the Supreme Court to cases on collateral review. Rather, Petitioner's application is based entirely on the assertion that he was denied a newly created rule of constitutional law that applies retroactively, which was rejected by this Court in Williams. The Court should deny Petitioner's application as it fails to satisfy the statutory requirements for a successive section 2255 petition.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court deny Petitioner's application for leave to file a second or successive section 2255 motion.

Respectfully submitted,

Dated: March 22, 2013

B. TODD JONES
United States Attorney

s/Ann M. Anaya
BY: ANN M. ANAYA
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